IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Harm Reduction Nurses Association v. British Columbia (Attorney General),* 2023 BCSC 2290

Date: 20231229
Docket: S237607
Registry: Vancouver

Between:

Harm Reduction Nurses Association / Association des Infirmiers et Infermières en Réduction des Méfaits

Plaintiff

And

His Majesty The King in Right of The Province of British Columbia and the Attorney General of British Columbia

Defendants

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the Plaintiff:	D.J. Larkin C. Shane
Counsel for the Defendants:	L.F. de Lima P. McLaughlin
Place and Date of Hearing:	Vancouver , B.C. December 5 and 7, 2023
Place and Date of Judgment:	Vancouver, B.C. December 29, 2023

Introduction

[1] The plaintiff, Harm Reduction Nurses Association/Association des infirmiers et infirmières en réduction des méfaits ("HRNA"), is a national organization incorporated in 2017 under the *Canada Not-for-profit Corporations Act*, S.C. 2009, c. 23. HRNA's mission is to advance harm reduction nursing excellence through practice, education, research, and advocacy. HRNA has approximately 220 members across Canada and approximately 76 members in British Columbia.

[2] The plaintiff has applied to enjoin the entering into force of the *Restricting Public Consumption of Illegal Substances Act*, S.B.C. 2023, c. 40 (the "*Act*") on an interim basis until March 31, 2024.

[3] The *Act*, if brought into force, would prohibit people from consuming certain illegal substances in certain public areas, subject to broad discretionary powers held by the Lieutenant Governor in Council (the "LGC") to designate additional areas and make various exemptions. A police officer could order an individual to cease the consumption of an illegal substance or to move from a place, and noncompliance could be punished by a maximum fine of $2,000 and/or a term of imprisonment up to six months. The seizure and destruction of illegal substances is also contemplated in the *Act*.

[4] The plaintiff asserts that the *Act*, if brought into force, will lead to various violations of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Charter*], including the ss. 7 and 12 rights of People Who Use Drugs ("PWUD"), the s. 7 rights of the plaintiff and its members, and the s. 15 rights of Indigenous people. The plaintiff also alleges that the *Act* is *ultra vires* of the authority of British Columbia's Legislature.

[5] The defendants (who I will refer to as the "Province") contend that this application is premature and that in any event, the test for an interim injunction is not made out.

[6] For the reasons that follow, I find that the plainitff has satisfied the test for an interim injunction on the basis of the s. 7 grounds they allege.

Background

[7] The *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 [*CDSA*] makes the possession of a variety of substances listed in its Schedules an offence punishable by either summary conviction or indictment.

[8] Since April 14, 2016, due to a sharp increase of drug related overdoses and drug related deaths across the province, British Columbia has been under a Public Health Emergency declared by then Provincial Health Officer, Dr. Perry Kendall (the "Emergency Declaration").

[9] On December 9, 2016, then Minster of Health, Terry Lake, issued a Ministerial Order under the *Emergency Health Services Act*, RSBC 1996, c 182 and the *Health Authorities Act*, RSBC 1996, c 180 requiring Overdose Prevention Sites ("OPS") in "in any place there is a need for these services, as determined by the level of overdose related morbidity and mortality" (the "Ministerial Order"). The Ministerial Order was to remain in place for the duration of the declared Public Health Emergency.

[10] In July 2017, the Province established the Ministry of Mental Health and Addictions, in part, to coordinate a province-wide approach to addressing the Public Health Emergency.

[11] As part of its comprehensive public health response, the Province applied to Health Canada requesting an exemption under s. 56(1) of the *CDSA* from the prohibitions in s. 4(1) against personal possession of small quantities of certain illicit substances. Section 56(1) of this *CDSA* provides:

> 56(1) The Minister [of Health] may, on any terms and conditions that the Minister considers necessary, exempt from the application of all or any of the provisions of this Act or the regulations any person or class of persons or any controlled substance or precursor or any class of either of them if, in the

> opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest.

[12] In particular, the Province requested an exemption that would decriminalize personal possession of up to 2.5 grams cumulatively of the following illicit substances:

a) opioids (including heroin, morphine, and fentanyl);

b) cocaine (including crack and powdered cocaine);

c) methamphetamine (i.e., meth); and,

d) MDMA (i.e., ecstasy).

[13] In May 2022, the federal Minister of Mental Health and Addictions, and Associate Minister of Health announced that British Columbia had been granted a three-year exemption decriminalizing personal possession as described above. The exemption came into effect on January 31, 2023 and is set to expire on January 31, 2026 ("decriminalization"; and the "Exemption Order").

[14] The Exemption Order was limited in its scope as follows:

> Definitions
>
> ...
>
> "*Adult*" means an individual who is 18 years of age or older. (*adulte*).
>
> …
>
> "*Child care facility premises*" means the premises on which supervision of children under 13 years of age is provided in accordance with a licence issued under section 11 of the *Community Care and Assisted living Act*, S.B.C. 2002, c. 75. (*lieu d'une garderie*).
>
> …
>
> "*Illegal substance*" means an opioid, cocaine, methamphetamine or MDMA, as set out In the Annex. (*substance illegale*).
>
> "*K-12 School premises*" means the premises
>
> a. owned or leased by a board or francophone education authority, as defined in the *School Act*, R.S.B.C. 1996, c. 412, or an authority, as defined in the *Independent School Act*, R.S.B.C. 1996, c. 216; and

> b. at which students receive instruction in an educational program, as defined in the *School Act* or *Independent School Act*, as applicable. *(lieu d'une ecole primaire et secondaire*).
>
> "*Minor*" means an individual under 18 years of age. (*mineur*).
>
> …
>
> "*Playground*" means an outdoor play area intended for use by minors, where structures are permanently affixed and to which the public have access. (*terrain dejeu*).
>
> "*Premises*" means a building or structure and includes outside areas adjacent to the building or structure ordinarily used in the course of providing services. (*lieu*).
>
> …
>
> "*Spray Pool*" has the same meaning as in section 1 of the *Pool Regulation*, B.C. Reg. 296/2010, that is outdoors and to which the public have access. (*aire de jeux d'eau*).
>
> "*Skate Parks*" means an outdoor area intended for the use of non-motorized scooters and bicycles, skateboards, in-line skates, or similar devices, and to which the public have access. (*planchodrome*).
>
> "*Wading pool*" has the same meaning as in section 1 of the Pool Regulation, B.C. Reg. 296/2010, that is outdoors and to which the public have access. (*pateaugeoire*).
>
> "*Watercraft*" means a vessel or other craft in, on or by which an individual or thing may be transported or drawn on water, excluding *Canadian Coast Guard vessels*. (*embarcation*).

[15] In granting the Exemption Order, the federal Minister of Mental Health and Addictions, and Associate Minister of Health issued a "Letter of Requirements" to the Province outlining necessary actions the Province had to undertake throughout the implementation, monitoring, evaluation phases of the decriminalization. Pursuant to the Letter of Requirements, the Ministry of Mental Health and Addictions was required to:

> Moving forward, B.C. must continue to engage with a range of stakeholder groups representing a variety of viewpoints, throughout all stages of the process to address relevant concerns and inform implementation. In particular B.C. must undertake ongoing engagement with people who use drugs, law enforcement, racialized and diverse communities, youth, business improvement associations, municipalities and other key stakeholders to identify the meaningful public health and public safety indicators, as well as throughout implementation, monitoring and evaluation phases of the exemption.
>
> …

> … The Province will uphold the spirit and principles of reconciliation under the BC *Declaration on the Rights of Indigenous Peoples Act*, and continue to consult with Indigenous governments, communities, partners and experts when working towards the implementation of the exemption …
>
> …
>
> [The Ministry] must continue to work closely with law enforcement partners throughout the entire process to address relevant concerns, to ensure effective implementation and risk mitigation prior to, during and following implementation, and to continue to support law enforcement in addressing organized crime.

[16] There was evidence before me that between January and September 1, 2023, 1,645 people died of drug overdoses in British Columbia alone. April 2023 had the highest rate of overdose deaths per day, at approximately 7.8. Overall, the rate of death due to toxic drugs in British Columbia in 2023 has been 45.7 deaths per 100,000 individuals. More broadly, the Public Health Emergency persists.

The Restricting Public Consumption of Illegal Substances Act

[17] On November 8, 2023, the Province passed the *Act* which placed partial restrictions on where illegal substances could be consumed in public. The *Act* has not yet been brought into force, nor has the LGC revealed or implemented applicable regulations.

[18] A stated purpose of the *Act* is to resolve inconsistencies in how municipal and local governments, including police, address public drug use. On October 23, 2023, the Minister of Public Safety and Solicitor General Mike Farnworth stated: “Through this legislation, our government also intends to reduce the patchwork approach to addressing public drug use at the local government level,” followed by, “... this legislation aims to establish a consistent set of provincewide standards around public drug use and provide police with the tools to help redirect people who are using drugs in inappropriate areas to better and safer places ... where they can stay alive.”

[19] Section 1 of the *Act* defines “illegal substance” as having the same meaning as in the Exemption Order.

[20] Section 3(1) of the *Act* provides that a person must not consume an illegal substance in the following listed areas or places:

> 3(1) A person must not consume an illegal substance in any of the following areas or places or remain in any of the following areas or places after consuming an illegal substance in the area or place:
>
> (a) the area within 15 m of any of the following places:
>
> (i) any part of a play structure in a playground;
>
> (ii) a spray pool or wading pool;
>
> (iii) a skate park;
>
> (b) any of the following places if the public has a right of access to the place:
>
> (i) a sports field;
>
> (ii) a beach;
>
> (iii) a park within the meaning of the *Park Act*;
>
> (iv) a regional park within the meaning of the *Local Government Act*;
>
> (v) an outdoor area established by a local government for purposes of community recreation;
>
> (vi) a permanent public park over which the Park Board has jurisdiction under section 488 of the Vancouver Charter;
>
> (vii) a park held in trust by a local government;
>
> (c) the area within 6 m of the outside of the entrance to any of the following places:
>
> (i) a place to which the public has access as of right or by invitation, express or implied, whether or not a fee is charged for entry;
>
> (ii) a workplace;
>
> (iii) a prescribed place;
>
> (d) the area within 6 m of the outside of the entrance to a place occupied as a residence, if the public has a right of access to the area;
>
> (e) the area within 6 m of a public transit bus stop;
>
> (f) a prescribed place;
>
> (g) the area within a prescribed distance from a prescribed place.

[21] Section 3(2) of the *Act* provides that the restrictions set out in ss. (1)(a) [playgrounds, wading pools, and skate parks], (b) [parks and beaches], and (e) [near

bus stops] do not apply to “an area to which the public does not have a right of access”.

[22] Whereas s. 3 of the *Act* describes the areas and places where a person is prohibited from consuming illegal substances, s. 9 of the *Act* grants the LGC broad regulatory powers that allow it to make regulations referred to in s. 41 of the *Interpretation Act*, RSBC 1996, c 238, including carefully tailored exemptions from the application of s. 3. More specifically, s. 9(2) of the *Act* permits the LGC to make regulations:

> a) prescribing places for the purposes of s. 3(1)(c) (iii), (t) or (g), which may be different for each paragraph in that section;
>
> b) prescribing a distance for the purposes of section 3(1)(g), which may be different for different places or classes of places;
>
> c) exempting the following, or a class of the following, from all or part of section 3:
>
> (i) a person;
>
> (ii) an illegal substance;
>
> (iii) a form of consumption of an illegal substance;
>
> (iv) a thing;
>
> (v) a place;
>
> (vi) an area within a specified distance of a thing or place.

[23] A regulation under s. (2)(c) of the *Act* may provide:

> (a) limits or conditions on the exemption, and
>
> (b) circumstances in which the exemption applies.

[24] Section 4 of the *Act* provides that a police officer, having reasonable grounds to believe that a person is consuming or has recently consumed an illegal substance in a restricted place or area, may direct that person to: "cease consuming an illegal substance in the area or place or leave the area or place".

[25] A person who refuses a police direction commits an offence under the *Offence Act*, RSBC 1996 c. 338, punishable by a maximum fine of $2,000 and/or a term of imprisonment up to six months. Section 8 of the *Act* makes it an offence for a person to fail to comply with an officer's directions given under s. 4. If an officer has reasonable grounds to believe that a person is committing an offence under s. 8, that officer has discretion to take the following actions:

a) arrest the person without a warrant (s. 5);

b) seize and remove any illegal substances and packages containing illegal substances (s. 6(a));

c) destroy any seized illegal substances (s. 6(b)); or,

d) submit for analysis or examination any seized substance or sample of a seized substance (s. 7).

[26] Section 12 of the *Act* provides that the "*Act* comes into force by regulation of the Lieutenant Governor in Council". The LGC has not enacted a regulation bringing the *Act* into force, nor any other regulations.

The Application

[27] On November 9, 2023, the plaintiff filed a Notice of Civil Claim, together with a Notice of Constitutional Question, challenging the constitutionality of the *Act*.

[28] The plaintiff seeks an interim injunction under Rules 8-1 and 10-4 of the *Supreme Court Civil Rules*, BC Reg 168/2009 [*Rules*] to suspend the coming into force of the *Act* until March 31, 2024. The plaintiff contends that jurisdiction to grant

a pre-trial injunction is found at section 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253.

[29] The plaintiff submits four grounds for the requested relief:

a) Unjustifiable violations of ss. 7 and 12 *Charter* rights of people who use drugs;

b) Unjustifiable violations of s. 7 *Charter* rights of the plaintiff and its members;

c) Unjustifiable violations of s. 15 *Charter* rights of Indigenous people; and,

d) An *ultra vires* exercise of power under section 91(27) of the *Constitution Act*, 1867.

[30] The plaintiff seeks to be relieved from giving an undertaking as to damages. It also seeks an order that it be awarded its costs of this application in any event of the cause, or in the alternative, that no costs be awarded against it in any event of the cause.

Constitutional Interim Injunctions

[31] In *Snuneymuxw First Nation et al. v. R.*, 2004 BCSC 205 [*Snuneymuxw*], Justice Groberman confirmed the inherent jurisdiction by which this Court may, in constitutional cases, grant interim relief to stay the effect of legislation:

> [65] … RJR - Macdonald establishes that in constitutional cases the court may, where warranted, grant interlocutory orders temporarily suspending legislation. At page 329, the court holds that it may use such powers to "preserve matters between the parties in a state that will prevent prejudice as far as possible pending resolution by the Court of the controversy."
>
> [66] The Supreme Court of Canada, as a statutory court, was required to find a statutory basis for that power, and discussed the specific provisions of its Rules and constating legislation. It emphasized, however, that even had it not found authority in the specific legislation under which it operates, more general authority was available in support of the remedy. At page 332, it stated:

> Finally, if jurisdiction under s. 65.1 of *the Federal Supreme Court Act* and r. 27 were wanting, we would be prepared to find jurisdiction in s. 24(1) of the *Charter*. A *Charter* remedy should not be defeated due to a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.
>
> [67] A fortiori, it would seem that the power to stay the effect of legislation is present within the Supreme Court of British Columbia, a court of inherent jurisdiction.

[32] Justice Groberman concluded that:

> [69] The relief under consideration in *RJR - Macdonald*, was injunctive in nature, although the court preferred to use other words to describe it. Jurisprudential consistency demands that I find that this court has jurisdiction to grant interlocutory injunctive relief against the Crown. Such jurisdiction is limited, and to be exercised sparingly. It arises only in constitutional cases, and ought to be used only in respect of interlocutory injunctions.

[33] In *Trest v. British Columbia (Minister of Health)*, 2020 BCSC 1524, Justice Basran discussed the limited remedial jurisdiction that courts have to grant injunctions against the Crown. He dismissed an application for an interlocutory injunction that would have restrained the Ministry of Education from advancing to the next stage in a five-stage "restart plan" for schools during the COVID-19 pandemic, identifying the following principles:

a) "[I]njunctions against the Crown and officers of the Crown are prohibited by ss. 11(2) and (4) of the *Crown Proceedings Act*, R.S.B.C. 1996, c. 89": at para. 53;

b) "An interlocutory injunction will not be issued against the Crown where it is acting within its sphere of legislative authority": at para. 57; and,

c) "The jurisdiction to grant interlocutory injunctive relief against the Crown is limited jurisdiction to be used sparingly, and only in constitutional cases": at para. 57.

[34] The authority to grant such injunctive relief was also discussed *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2018 BCSC 2084, leave application dismissed 2019 BCCA 29 [*Cambie Surgeries BCSC*], where

Justice Winteringham noted that "the issues presented in … constitutional litigation very much engage a consideration of the role and interaction between legislatures and courts": at para. 105. While Winteringham J. commented that courts will not question the wisdom of enactments, she also remarked that "there is an important line between making policies at the legislative level and testing public policy against constitutional standards": *Cambie Surgeries BCSC* at para. 106. It is always open to a party to bring an application to determine what should happen "on the ground" pending a determination on the underlying litigation.

The Test for an Interim Injunction

[35] Justice LeBel outlined the first step of the test for an interim injunction in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CanLII 117 (SCC) [*RJR-MacDonald*] at 348:

> At the first stage, an applicant for interlocutory relief in a *Charter* case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits … A motions court should only go beyond a preliminary investigation into the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.

[36] The second stage of the test set out in *RJR-MacDonald* was explained by LeBel J. at 348:

> At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

[37] The third stage of the test set out in *RJR-MacDonald* was explained by LeBel J. at 348-349:

> The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving Charter rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.
>
> We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

[38] The plaintiff seeks a suspension of the *Act's* coming into force and not an exemption therefrom. Public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" cases because "the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of the law is suspended entirely": *RJR-MacDonald* at 346.

[39] In suspension cases, an interim or interlocutory injunction will be issued only in "rare" and "exceptional" circumstances: *Manitoba (AG) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 at 147-48, 1987 CanLII 79 (SCC).

[40] In *Harper v. Canada (Attorney General)*, 2000 SCC 57 [*Harper*], a majority of the Supreme Court of Canada stayed an interlocutory injunction that suspended certain provisions of the federal *Canada Elections Act*, S.C. 2000, c. 9, related to third-party spending limits. The majority found that the balance of convenience favoured the operation of legislation created through the democratic process. The Court explained that there is presumption that the law will produce a "public good" and that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed. The majority held that "it is

wrong to insist on proof that the law will produce a public good": *Harper* at para. 9. The majority continued in *Harper* at para. 9 to the effect that:

> …
>
> The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed.

[41] In *Cambie Surgeries BCSC*, Winteringham J. reviewed recent decisions denying injunctive relief in order to articulate the legal framework and threshold to be met in such cases, and found that in face of the presumed public good of duly enacted legislation, applicants "must establish that the granting of an injunction will serve a valuable public purpose": at para. 144.

[42] The nature of the relief sought in the instant circumstances is to prevent prospective harm and as such, the plaintiff must establish a "high degree of probability that the alleged harm will in fact occur": *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, 1985 CanLII 74 (SCC) at para. 35.

Discussion

Standing

[43] I am satisfied that the plaintiff has both a direct and a public interest in the application before me.

[44] The plaintiff's direct interest is based upon the difficulties that its members may face if the *Act* comes in to force. HRNA's members work in various health and community care settings, including community outreach, OPS, supervised consumption sites ("SCS"), emergency rooms and hospitals, and medical clinics. Some of HRNA's members have lived experience of drug use, and most of HRNA's members have close family or friends who use drugs.

[45] The plaintiff argued that its members' security of the person is engaged in light of the serious psychological harm the *Act* will invite upon them. As Chief Justice

Lamer wrote in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, 1999 CanLII 653 (SCC), a restriction on a person's security of a person may be made out where there is "a serious and profound effect on a person's psychological integrity": at para. 60. The plaintiff also suggested that its members' job will potentially be made more dangerous by the *Act* insofar as outreach will have to be conducted in more isolated and hidden locations.

[46] The plaintiff's public interest stems from the circumstances of those who its members serve, who I accept are largely unable to advocate for themselves. On this basis, the plaintiff meets the test set out in *British Columbia (Attorney General) v. Council of Canadians with Disabilities*, 2022 SCC 27. The decision to grant or deny public interest standing is discretionary, and legality and access to justice underly the exercise of that discretion. Moreover, in exercising this discretion, I have turned my mind to the seriousness and justiciability of the instant issues, the genuineness of the plaintiff's interest in the matter, and the reasonableness and effectiveness of this suit as a means of bringing the instant issues to this Court.

Charter Grounds

Serious Issue to be Tried

[47] The standard to be met in establishing a serious issue to be tried is, broadly, that the underlying claim is not frivolous or vexatious: *RJR-MacDonald* at 348.

[48] In *Cambie Surgeries Corp. v. British Columbia (Attorney General)*, 2019 BCCA 29 [*Cambie Surgeries BCCA*], Justice Newbury, sitting in Chambers, re-affirmed that there is a "low bar" at the 'serious question' stage. Justice Newbury found that the "law is clear that an 'arguable' or 'serious' case is sufficient" and that a higher standard is not required in constitutional case: *Cambie Surgeries BCCA* at paras. 49, 57. Newbury J. also noted that:

> [50] As far as the Attorney's first ground of appeal – that the chambers judge proceeded on a wrong principle in granting an injunction in the absence of finding that a "clear case" of unconstitutionality had been established – is concerned, none of the authorities supports the assertion that a motions judge should find facts or reach conclusions on the outcome of the issues

> that stand to be decided at trial. I see no merit in the Attorney's first proposed ground of appeal, which rests on a misconception of the nature of an interlocutory injunction. Indeed it would have been erroneous for the chambers judge to have attempted to reach any final conclusion on the constitutionality of the impugned provisions of the MPA.

[49] The plaintiff asserted that the *Charter* interests in play are serious, according to applicable case law, and involve – broadly – the interest of systemically marginalized persons in safeguarding their own lives and safety. Moreover, the instant events have and are occurring within the context of a Public Health Emergency in British Columbia.

[50] As Chief Justice McLachlin held in *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134, 2011 SCC 44 (CanLII) [*PHS*], "[w]here a law creates a risk to health by preventing access to health care, a deprivation of the right to security of the person is made out" and "[w]here the law creates a risk not just to the health but also to the lives of the claimants, the deprivation is even clearer": at para. 93. While the instant facts differ from *PHS* and other cases involving direct statutory restrictions on the availability of healthcare (see for e.g. *R. v. Malmo-Levine*, 2003 SCC 74 at para. 89; *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 60, 82, 92, 1988 CanLII 90 (SCC); see also C*haoulli v. Quebec (Attorney General)*, 2005 SCC 35 at paras. 118-119 (McLachlin C.J. and Major J. concurring)), by directing PWUD and those who care from them away from public places, there is a prescient risk that the *Act* will push PWUD further from health services and deprive accesses thereto.

[51] The plaintiff also noted that this Court has found that the continual and involuntary displacement of unhoused persons may seriously implicate their s. 7 *Charter* rights: see *Vandenberg v. Vancouver (City) Fire and Rescue Services*, 2023 BCSC 2104 at paras. 143-150.

[52] The Province focused its arguments not on frivolity or vexation, but instead on the absence of regulatory context for the impugned legislation. The Province contended that, as is the case in many regulatory schemes, ss. 3 and 9 of the *Act* are complementary and operate together as a tightly linked legislative unit. In this

way, the LGC is afforded considerable discretion to determine the extent to which public consumption of illegal substances should be restricted. Consequently, absent some sense of how that discretion will be exercised, the Province argued, that this challenge to the *Act* is premature, and there could be no serious question to be tried.

[53] In *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2 [*MiningWatch*], Justice Rothstein determined that an interpretation of s. 21 of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 [*CEAA*] required consideration of the *Comprehensive Study List Regulation*, SOR/94-638 [*CSL*]. This was because the *CSL*, promulgated under the *CEAA*, was "tightly linked to the CEAA" and was one of the "'[f]our regulations ... needed to make the *Act* work'": *MiningWatch* at para. 31. The Court recognized that "'[w]hen regulations are made to complete the statutory scheme; they are clearly intended to operate together and to be mutually informing'": *MiningWatch* at para 31.

[54] The Supreme Court of Canada adopted a similar approach in *Reference re Impact Assessment Act*, 2023 SCC 23 [*Reference re IAA*], where the issue before the Court was whether the federal *Impact Assessment Act*, SC 2019, c 28 [*IAA*] and regulations promulgated thereunder were within the legislative competency of Parliament. The majority in *Reference re IAA*, referring to *MiningWatch* with approval, proceeded to consider the validity of the *IAA* and the regulations together as a single legislative unit:

> [59] The sole issue in this appeal is whether the *IAA* and the Regulations are *ultra vires* Parliament. I will consider the validity of the *IAA* and the Regulations together as they are tightly linked and function as a unified scheme (see *MiningWatch,* at para. 31). The Regulations complete the statutory scheme by specifying the scope of the *IAA's* application to certain "designated projects"; they are indispensable to the *IAA's* characterization and classification (see *R v. Morgentaler*, 1993 CanLII 74 (SCC), [1993] 3 S.C.R. 463. at p. 481). I note that the Court of Appeal adopted the same approach in its analysis (paras. 165 (majority) and 554 (dissent)).

[55] The Province asserts that, as in *MiningWatch* and *Reference re IAA*, the *Act* and the forthcoming regulations thereunder must be contemplated together, and that the seriousness of the issue to be tried cannot be ascertained absent that full context. In other words, the forthcoming regulations contemplated by s. 9 of the *Act*

will “complete the scheme" by specifying the scope of the restrictions on public consumption in the *Act*.

[56] I disagree. I conclude that I must determine the application before me on the *Act* as it is presently written; that is, without any regulations, as that is the form that the Province proposes to bring into force. Unless the LGC were to, in effect, exempt from the *Act* so as to render it moot entirely, the *Charter* implications pleaded by the plaintiff would remain attendant, and the issues to be tried would remain serious. Just because the LGC may have the authority to tailor the application of the *Act* does not guarantee the form that any such tailoring may take, nor does it guarantee that any such tailoring will occur at all.

[57] I am satisfied that the plaintiff has raised serious questions to be tried in respect of s. 7 *Charter* grounds. On the evidence tendered, I find that these underlying claims are not frivolous or vexatious, and that they are sufficiently arguable and serious for the purposes of the applicable test.

Irreparable Harm

[58] As Justice Warren recently set out in *Federation of Law Societies of Canada v. Canada (Attorney General)*, 2023 BCSC 2068:

> [26] This stage requires the applicant to convince the court that irreparable harm will result if the relief is not granted. It is the nature of the harm, rather than the magnitude, that is considered. Harm will be irreparable if it cannot be quantified in monetary terms, or if the harm cannot be cured, usually because one party cannot collect damages from the other: *RJR-MacDonald* at 341.

[59] The Province contended that ss. 3-6 of the *Act* have the potential effect of diminishing the legal jeopardy that PWUD currently face, since these areas are excluded from the Exemption Order. PWUD who are found possessing (including by using) illegal substances within these areas face a potential criminal conviction under s. 4(1) of the *CDSA* and imprisonment for up to seven years. The *Act*, however, provides police officers with an alternative course by asking PWUD to stop consuming or leave these areas absent the stricter prospects of the *CDSA*.

[60] The Province argued, on this basis, that rather than creating irreparable harm, the coming into force of the *Act* would actually reduce the jeopardy PWUD currently face when consuming illegal substances in areas within 15 meters of any part of any play structure in a playground, a spray pool or wading pool, or a skate park.

[61] The plaintiff conceded that the burden of demonstrating particular irreparable harm – whether to the plaintiff itself or to a broader class of people – falls to it, at this stage. The plaintiff submitted that there is a high degree of probability, verging on certainty, that the coming into force of the *Act* will cause irreparable, irreversible, and life-threatening harm to PWUD and psychological harm to nurses who support them.

[62] The Province contends that there is considerable jurisprudence describing the type of evidence required in order for an applicant to establish irreparable harm:

a) In *Cimolai v. Children's & Women's Health Centre of British Columbia*, 2001 BCSC 1537, Justice Kirkpatrick explained that “proof of irreparable harm cannot be inferred and that evidence of irreparable harm must be clear and not speculative”: at para. 34;

b) In *Biathlon Canada v. Canada (National Revenue)*, 2010 FC 1051, Justice Mactavish explained that “it will not be enough for a party seeking the injunction to show that irreparable harm may arguably result if the [injunction] is not granted… rather the burden is ... to show that the irreparable harm *will result*”: at para. 29;

c) In *Viet Pharmacy Ltd. v. British Columbia (Minister of Health)*, 2015 BCSC 1657, Justice Punnett rejected a claim of irreparable harm, having found the applicant's evidence to be “conclusory, unsubstantiated and speculative”: at para. 41; and,

d) In *Glooscap Heritage Society v. Canada (National Revenue),* 2012 FCA 255, the Federal Court of Appeal explained that “[t]o establish irreparable harm, there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will

result unless [injunctive relief] is granted" and that "[a]ssumptions, hypotheticals and arguable assertions, unsupported by evidence, carry no weight": at para. 31.

[63] The Eastside Illicit Drinkers Group for Education ("EIDGE") is a member-directed education and support group based in the Downtown Eastside of Vancouver whose approximately 60 members are current or former drinkers of alcohol not regulated for human consumption or who use regulated alcohol in ways that are criminalized, the majority of whom also use drugs from the unregulated drug market. Aaron Bailey, the Program Coordinator for EIDGE, provided affidavit evidence and supporting research that its members, if subject to the *Act's* enforcement tools, would experience myriad health and safety harms.

[64] The plaintiff employed a variation of Aaron Bailey's categorical device to structure their written submissions, which I find to be helpful in considering the tendered evidence. The applicable categories are as follows:

a) **Increased interactions with law enforcement**, which leads to isolated drug use and the overriding of harm reduction measures, both of which are evidenced to increase the risk of serious bodily harm, including HIV, Hepatitis C, overdose, and fatal overdose;

b) **Involuntary displacement**, which leads to disruptions in the delivery of vital healthcare services, including overdose response;

c) **Drug seizures**, which lead to withdrawal, increased use of cheaper, lower-quality substances, increased reliance on the illegal drug market, and engagement in risky or otherwise illicit income-generating activities;

d) **Fines**, which lead to financial hardship, further legal consequences and interactions with the criminal justice system, and engagement in risky or otherwise illicit income-generating activities; and,

e) **Detention, arrest, and imprisonment**, all of which EIDGE members report are traumatizing, health-jeopardizing, and disproportionately imposed on Indigenous people.

The Context of Public Health Emergency

[65] Before considering the categories of harm outlined above, it is first important to consider the context in which the *Act* is set to be implemented.

[66] I have already set out that British Columbia is in a Public Health Emergency. As part of these circumstances, the plainitff argued, and I accept, that the unregulated nature of the illegal drug supply is the predominant cause of increasing death rates in British Columbia. A March 9, 2022 report to the B.C. Coroner Service by a Death Review Panel ("Death Review Panel") on illicit drug deaths between 2017-2021 reported that:

> The primary cause of increased deaths is the growing toxicity and unpredictability of the street supply of drugs. The current drug policy framework of prohibition is the primary driver of this illegal, unregulated and toxic street supply. Until new regulatory approaches are implemented within the national drug policy framework, and improvements in the quality and reach of the continuum of support, harm reduction and treatment services are made, the risk of significant harms, death and this public health emergency are unlikely to improve.

[67] The Death Review Panel found that stigmatization of PWUD is rooted in drug policy and that "[c]riminalizing drug use behaviour ensures an ongoing public perception that it is deviant and shameful, creating a barrier to people seeking the support they need as well as requiring people to hide their needs for fear of criminal sanctions": at 25.

[68] Corey Ranger, a registered nurse and the President of the plaintiff's Board of Directors, attested that:

> Thousands of our family members, friends, and patients in B.C. die every year due to criminalization and lack of unpoisoned supply. This Bill poses serious potential to worsen the experiences of psychological injury and distress among nurses. Nurses already experience moral distress trying to provide care against the backdrop of multiple public health crises including

> the unregulated drug poisoning emergency, rising rates of homelessness, and clients who experience structural violence daily.
>
> All of our members will be negatively impacted by watching their patients, friend, and family experience more harm and even die if the Bill comes into effect.

[69] Moreover, I accept that the evidence before me establishes that both OPS and SCSs provide a safer, legal environment where people can usually use drugs, thereby reducing consumption on the street, access harm reduction equipment and connections to healthcare and other supports as well as receive overdose response and access drug testing.

[70] The plaintiff contends that the Ministerial Order requiring OPS throughout B.C. is not being fulfilled, as concluded by the B.C. Legislature's Select Standing Committee on Health. Presently, there are only 47 SCS and OPS in British Columbia. Existing consumption services concentrate in urban areas, leaving PWUD in remote and rural areas, including on reservation land, even less likely to be able to access them.

[71] Even where OPS or SCS exist, they do not operate 24 hours per day or 7 days a week, and only 19 provide inhalation services, despite the fact that smoking is the most common method of consumption among unregulated drug toxicity deaths at 65% in 2023.

[72] I have turned my mind to this context in considering whether there is any irreparable harm posed by the *Act*.

Interactions with Police and Drug Seizure

[73] The plaintiff contended that fear amongst PWUD of interactions with police and the criminal justice system, whether real or perceived, can 'override' risk mitigation measures and lead to more isolated or lone drug use.

[74] Evidence was led that that police presence negatively impacted contact between health services and injection drug users ("IDUs"), as outreach was compromised due to their displacement. Moreover, police activities were said to

negatively influence IDUs' access to syringes and their willingness to carry syringes, and syringe confiscation was reported.

[75] A 2023 study reported that more than two thirds of PWUD who had their drugs seized by police immediately obtained new drugs after the incident. Consequently, the practice of drug seizures by police "can lead to more frequent interactions with the unregulated market, sometimes with direct impacts on their health and safety, including but not limited to fatal overdose": Hayashi et al, "Police seizure of drugs without arrest among people who use drugs in Vancouver, Canada, before provincial 'decriminalization' of simple possession: a cohort study" (2023) 20:117 Harm Reduction J 1 at 8.

[76] The plaintiff also asserted, and I accept, that drug users found by police after using or being perceived to have used drugs could have whatever remained of their drug supply seized and/or destroyed, which could lead to a range of harms including withdrawal or the resort to the use of cheaper lower quality drugs from unknown suppliers.

Displacement

[77] The concept of displacement, as the plaintiff referred to it, is the potential for PWUD to be displaced from the area they have used or are using drugs. The plaintiff suggested that the prospect of displacement – and the means by which it is accomplished – may lead to a fear of encountering the police after using a drug in a public area. My understanding from the plaintiff's submissions was that the prospect and/or fear of having to leave a place of drug use after using could encourage lone drug use.

[78] The plaintiff further argued that the greatest risk of harm and death occurs within the minutes or hours after using unregulated drugs. This remains true, it argued, even when naloxone is administered to those who have overdosed, because the durational effect of naloxone is shorter than that of many opioids and it precipitates strong and immediate withdrawal symptoms. In result, a person may experience an overdose, receive naloxone, and subsequently overdose again.

[79] I accept that lone drug use may be particularly dangerous due to an absence or a diminished degree of support in the event of an overdose. When people are isolated and out of sight, they are at a much higher risk of dying from an unreversed overdose. The Death Review Panel's analysis found that the majority of deaths occurred among people who were alone (52%) at 20. Following COVID-19 restrictions introduced in April 2020, "the percentage of persons using illicit substances alone increased": Death Review Panel at 20.

[80] Moreover, research from Dr. Bruce Wallace asserts an association between using outdoors or in a public space in B.C. and nonfatal overdose events: Bruce Wallace et al, "Factors Associated with Nonfatal Overdose During a Public Health Emergency" (2018) 54:1 Substance Use & Misuse 39. In the majority of cases, study participants who had experienced a recent nonfatal overdose reported having been with other people, and having been administered naloxone and ambulance support at 42-43:

> Factors associated with recent non-fatal overdose in adjusted analyses included injecting fentanyl (knowingly or suspected) and public injection. Almost half of those who had recently overdosed reported that their most recent overdose event occurred outdoors or in a public space, just over a quarter reported that they had overdosed in a service organization or shelter and another quarter reported having overdosed in indoor housing. Participants most commonly reported use of heroin and/or fentanyl at their most recent overdose event. The majority of participants reported being with other people and having been administered naloxone as well as having an ambulance respond to the overdose event ...
>
> The study data are from a sample that includes a high proportion of people experiencing homelessness, who frequently inject in public, which was found to be significantly associated with an increased likelihood of experiencing nonfatal overdose. This finding is consistent with previous research in which injecting in public and vulnerabilities related to poverty and homelessness were associated with non-fatal overdose.

[81] It is apparent that public consumption and consuming drugs in the company of others is oftentimes the safest, healthiest, and/or only available option for an individual, given a dire lack of supervised consumption services, indoor locations to consume drugs, and housing.

[82] I also accept the plaintiff's submissions that issues surrounding displacement can override ingrained safety habits – including a tendency to use drugs with others – leading people to use alone and far from medical help. Displacement, to this extent, may readily contribute to fatalities and life-threatening infections.

[83] It is true, as the Province submits, that not all displacements will necessarily place PWUD in less public circumstances. But I am also satisfied that, at least in some circumstances, PWUD will be displaced to less public areas than those in which they might otherwise use drugs. To the extent that displacement will operate in this way, the *Act* poses a sufficiently high probability of irreparable harm.

[84] Beyond drug users, displacement can also affect service providers. The plaintiff provided affidavit evidence, which I accept, that the *Act* may result in its members being limited in their ability to provide life-saving care to their clients rendering their members' otherwise legal and mandated work potentially more dangerous, and may lead to death of clients, family, and friends that could cause its members serious psychological harm.

Imposition of Fines

[85] The imposition of fines upon people who cannot pay them can result in financial hardship and interminable cycle of criminal justice involvement. The risks of financial hardship are particularly acute for those requiring public space for the necessities of life during the winter months. Harms of this nature rise to the level of infringing *Charter* rights and may constitute irreparable harm: see *Prince George (City) v. Stewart*, 2021 BCSC 2089 at paras. 91-96.

Detention, Arrest, and Imprisonment

[86] Aaron Bailey, for the plaintiff, deposed that detention and arrest can be traumatizing and jeopardizing to the health of drug users. Incarceration can also disrupt care for PWUD. A 2021 study found that people who are released from custody are bear a marked risk of increased fatal overdose within the first two weeks after their release: Stuart A. Kinner, Wenqi Gan & Amanda Slaunwhite, "Fatal

overdoses after release from prison in British Columbia: a retrospective data linkage study" (2021) 9:3 cmaj Open E907 at E907.

[87] Likewise, in 2019, British Columbia's Provincial Health Officer found that "where people living with opioid use disorder are exposed to situations where they cannot avoid withdrawal symptoms (e.g., in police holding cells, or court cells) ... tolerance is lost, leading to an increased risk of overdose and death when they seek out and use opioids at the same dose they would have typically taken": British Columbia, Office of the Provincial Health Officer, *Stopping the Harm: Decriminalization of People Who Use Drugs in BC* (2019) at 19.

[88] Community group commentary by the B.C. Association of Social Workers expressed "grave concern" that the *Act* "puts more lives at risk" and "hits the most vulnerable hard again." Similarly, the B.C. Division of the Canadian Mental Health Association wrote that, "[a]s a mental health organization, [it has] a moral imperative to emphasize the consequences that may result from this proposed legislation and the ongoing stigma that is driving it."

Conclusion on Irreparable Harm

[89] Given the evidence before me, I find that there is a high degree of probability that at least some of the harm set out by the plaintiff will in fact occur. Centrally, but not exclusively, the *Act* will promote more lone drug use, which carries incumbent risks to PWUD and also the plaintiff's members.

[90] The Province argued that the plaintiff's evidence is composed almost entirely of affidavits prepared by administrators of public interest groups that are replete with anecdotal evidence, unsubstantiated conclusory statements, layers of unattributed hearsay, inadmissible expert opinions and policy recommendations. The evidence, it argues, is generic (and, therefore, without the necessary convincing level of particularity) and is factually untethered from the actual restrictions contained in the *Act.*

[91] I find it unnecessary, however, for me to place reliance on what the Province described as anecdotal evidence, unsubstantiated conclusory statements, and layers of unattributed hearsay and policy recommendations, as I find that the evidence adduced by the plaintiff from the Death Review Report on its own could establishes the risk of irreparable harm to at least some of the plaintiff's members, and to PWUD.

Balance of Convenience

[92] The plaintiff suggested that in a case, like this, where the fundamental rights and the lives and safety of marginalized people have been put at risk, the balance of convenience should fall overwhelmingly in its favour. It contends that, in light of the Province's actions in changing the *status quo*, it has acted swiftly to seek relief that it deems necessary. The Province responds that it must be assumed that the *Act* poses a public benefit, that this Court should assume the plaintiff is acting in its own interest, and that an interim injunction would deprive the public from the benefits of the law.

[93] In addition to the law on public benefit set out above, in *Snuneymuxw*, Groberman J. considered interlocutory injunctions against the Crown and explained:

> [71] Such relief should not be granted without a consideration of the public interest, including the public interest in the legitimacy of public institutions. The public interest includes, in my view, a high level of respect for the decisions of the legislative and executive branches of government; the jurisdiction of the courts to enjoin impugned government action which may or may not, in the end, be found to be unconstitutional must recognize the Court s own limited institutional competence and the public interest in having publicly elected bodies and officials enacting legislation and determining public policy.
>
> [72] The jurisdiction of the court, in appropriate cases, to interfere in legislative and executive decisions that are under challenge should not be too hastily exercised. The courts have a supervisory role to play, and should be wary of usurping legislative and executive roles and effectively governing by interlocutory order.

[94] There is no requirement at the balance of convenience stage that government provide proof that the impugned law will produce a public good. On an application for an interim or interlocutory injunction, the Court will assume that the impugned

legislation and its enforcement promote the public interest, and this assumption weighs heavily in the balance: *Harper* at para. 9.

[95] As explained by the majority in *Harper*, "[i]n order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit": at para. 9.

[96] In this case, the Province argued that the public interest to protect the life, health and safety of the public while also encouraging PWUD to connect to spaces where they can use safely and connect to services they need should prevail over the private interests of PWUD to use drugs "nearly wherever they want".

[97] I accept, as the law requires, that the *Act* poses a public benefit. Deputy Chief Constable Wilson, the co-chair of the Canadian Association of Chiefs of Police's drug advisory committee, and vice-president of the BC Association of Chiefs of Police, expressed support for the *Act* and the important public safety and health function it serves:

> The BC Association of Chiefs of Police appreciates the tools this legislation provides our members, which will ensure everyone in our communities feel safe, while we continue to support those who are living with addiction. We support today's announcement on new provincial legislation, while also recognizing that we must apply our discretion and utilize the act only when behaviour is problematic or repeated. Our goal is to not criminalize drug users, but to continue to direct people to alternate pathways of care while at the same time supporting our community's sense of safety.

[98] Moreover, I accept that the social harms associated with public illegal drug use range from the loss of public space due to open drug use, to discarded needles and other drug paraphernalia, to drug-related criminal activity and decreases in real and perceived public safety as reported by the British Columbia Association of Chiefs of Police in their 2021 report, as follows:

> Other harmful aspects of public consumption include litter, discarded needles and other biohazard material, vandalism, property crime, public nuisance complaints, as well as other unpredictable behaviour. As previously stated, CNS [or central nervous system] stimulants can cause psychotic episodes,

> violence and excited delirium, and other medical emergencies, which may put the public as well as the localized health services at risk.

[99] I further accept that the attendant public safety risks are particularly concerning given that many of the restricted areas and places in the *Act* are frequented by seniors, people with disabilities, and families with young children.

[100] I reject the submission, however, that the application before me is to permit PWUD to use drugs "nearly wherever they want". It is not asserted by the plaintiff that the Province cannot pursue any law or policy on the matter in issue. To conflate the general powers of the Province with the wording and purpose of the specific enactment at issue, the plaintiff contends, would constitute a misunderstanding of the nature of this litigation and would be inaccurate.

[101] The plaintiff concedes that the Province can always re-legislate in a manner that meets constitutional standards should the *Act* ultimately be struck down, and the Province has both legislative and policy alternatives that it could pursue.

[102] The plaintiff is pursuing the remedies it seeks in the midst of a years-long and ever-worsening public health emergency that is causing approximately seven unnecessary deaths each day. The plaintiff contends that as in *RJR-MacDonald* (at 353-354) and *Cambie Surgeries BCSC* (at para. 185), it seeks to advance "health and in the prevention of widespread and serious medical problems" for PWUD who are without alternatives. These are issues of undeniable public interest, benefit, and importance.

[103] Ultimately, I accept that the instant circumstances in British Columbia – a Public Health Emergency – are exceptional. In these circumstances, the applicable balance is as between the public benefit in suspending legislation that I am satisfied will cause irreparable harm, and allowing the legislation to persist and militate public benefits in diverting drug use from certain areas. In light of the evidence and in the instant circumstances, the balance must fall in the former direction.

[104] I am satisfied that the suspension of the *Act* – as the plaintiff proposes – can be properly characterized as a substantial public benefit.

[105] I find that the balance of convenience weighs in the plaintiff's favour.

Conclusion

[106] I am satisfied, in respect of the grounds raised under s. 7 of the *Charter*, that there are serious issues to be tried, that irreparable harm will be caused if the *Act* comes into force, and that the balance of convenience weighs in favour of the plaintiff.

[107] In light of my findings above, I find it unnecessary to turn to the plaintiff's ss. 12 and 15 *Charter* grounds or its federalism ground.

[108] I grant the requested interim injunction, and stay the effect of the *Act* until March 31, 2024, the date requested by the plaintiff.

Costs

[109] I will leave the issue of an undertaking from the plaintiff as to damages for the next phase of the hearing of the matter.

[110] I will award the plaintiff its cost of this application at Scale B of Appendix B of the *Rules*, in any event of the cause.

"The Honourable Chief Justice Hinkson"